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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a
Delaware corporation

Petitioner,

vs.

DSD DISTRIBUTORS, INC., a
Wisconsin corporation

Respondent.

Case No: 08 CV 0619 LAB RBB

**DSD DISTRIBUTORS, INC.'S
REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS OR STAY
PETITION TO CONFIRM
ARBITRATION AWARD;
REQUEST FOR ORAL ARGUMENT
AND TELEPHONIC APPEARANCE**

Judge: Hon. Larry A. Burns

Hearing
Date: June 9, 2008
(Reserved)

Time: 11:15 a.m.

REQUEST FOR ORAL ARGUMENT
AND TELEPHONIC APPEARANCE

Pursuant to Local Rule 7 and Rules 4f and 4g of the Court's Standing Order, Respondent and moving party DSD Distributors, Inc. respectfully requests an oral argument on this motion and further requests permission to appear telephonically at such oral argument.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Federal courts in the Ninth Circuit are required to abstain from exercising jurisdiction in a state court civil matter when the matter implicates important state interests, when a state proceeding is on-going and when the federal plaintiff could litigate its federal claims in state court. Except for the fact that the Petitioner, Hansen Beverage Company, has not filed any federal claims with this Court, all of the other tests for abstention under the *M&A Gabee* standard are satisfied.

Contrary to Hansen's suggestion by reliance on the recent Wisconsin, Rock County Circuit Court's order, the Rock County Circuit Court cannot, *sua sponte*, create subject matter jurisdiction in this Court. Federal Rule of Civil Procedure 8(a)(1) requires the Petitioner, Hansen Beverage Company, to affirmatively show subject matter jurisdiction exists under 28 U.S.C. § 1331, 1332 or some other specific federal statute conferring special jurisdiction before this Court may accept its petition. It is understood that the Federal Arbitration Act is not a source of independent subject matter jurisdiction in this or any other federal court. The parties are agreed that the law of the case is Wisconsin state law, specifically the Wisconsin Fair Dealership Law, *Wis. Stat. §§ 135.01, et seq.* and that the issues decided by the arbitrator arose exclusively under Wisconsin state law.

DSD has filed a Petition for Leave to Appeal the Rock County Circuit Court's decision with the Wisconsin Court of Appeals; therefore, DSD's state matter is on-going. (*Declaration of Julie A. Lewis, Exhibit 1.*) Hansen, which failed to remove DSD's original complaint to federal court in 2007, and whose federal action in the federal district court for the Central District of California was dismissed, is forum-shopping. *Hansen Petition*, Order for Dismissal, Exhibit 1, p. 51-52. Its request for confirmation of the arbitration award made, by decision of the case, under Wisconsin law, can easily be decided by the Wisconsin courts.

Hansen has not raised any issue of importance under federal law that requires the intervention of this Court. Hansen's Petition to Confirm the Award should be dismissed or stayed.

II. ARGUMENT

Federal courts in the Ninth Circuit have no discretion over when to exercise subject matter jurisdiction when the case involves ongoing proceedings in a sovereign state court. Hansen, in its reply to DSD's Motion to Dismiss or Stay its Petition, altogether fails to address the *M&A Gabee* standard regarding "Younger abstention;" however, that decision provides the rule of law that is applicable to this case. The Court is required to abstain from recognizing jurisdiction over Hansen's Petition because it falls squarely within the *M&A Gabee* abstention standard.

In addition, because the arbitration dealt exclusively with questions of Wisconsin law, Hansen must show that its Petition meets the amount in controversy requirement. Hansen's Petition does not satisfy Section 1332(a)'s amount in controversy requirement; therefore, the parties are not diverse.

A. Abstention is required under the *M&A Gabee* tests for Younger abstention.

The Ninth Circuit is quite specific – federal courts are to abstain from interference in a state court action when the tests set out in the decision are met.

A federal court must abstain to avoid interference in a state-court civil action when three tests are met. First, the proceedings must implicate important state interests; second, there must be ongoing state proceedings; and third, the federal plaintiff must be able to litigate its federal claims in the state proceedings. *M&A Gabee v. Community Redevelopment Agency of the City of Los Angeles*, 419 F.3d 1036, 1039 (9th Cir.2005).

1 DSD's state law claims were filed in Wisconsin circuit court on July 25,
 2 2007. Rather than removing DSD's complaint to federal court, Hansen appeared
 3 in state court and requested a stay or dismissal under Wis. Stats. §§ 788.02 and
 4 801.63 to allow arbitration to proceed in a foreign forum. Hansen's request was
 5 granted and the state court action was stayed pending arbitration in California.
 6 (*See Declaration of Julie A. Lewis*, Rock County Circuit Court Case No. 1120,
 7 Order from Hearing of July 31, 2007, Exhibit 2.) DSD's Motion for Partial
 8 Vacation of the Arbitration Award was filed on April 4, 2008, in the same action
 9 under *Wis. Stat.* § 788.10. All of the claims raised by DSD's motion are made
 10 under Wisconsin state law.

11 DSD's Memorandum filed in support of its motion to dismiss Hansen's
 12 Petition on jurisdictional grounds discussed the first test for *Younger* abstention
 13 under *M&A Gabee* at some length. The Wisconsin Fair Dealership Law
 14 specifically sets out the important state policies and purposes addressed by the
 15 statute. See *Wis. Stat.* §§ 135.025.

16 The second *M&A Gabee* test is also met. Rock County Circuit Court Case
 17 No. 2007-CV-1388 is on-going. The Rock County Circuit Court entered an Order
 18 on May 16, 2008, in which the Honorable Kenneth H. Forbeck determined that the
 19 court would stay DSD's motion because "the arbitration should be completed and
 20 finalized in Federal Court" *Hansen Petition*, Exhibit 3, p. 2.

21 In Wisconsin, a trial court's discretionary act will be sustained on appeal if
 22 the appellate court finds that the trial court (1) examined the relevant facts, (2)
 23 applied a proper standard of law, and (3) using a demonstrative rational process,
 24 reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 320
 25 N.W.2d 175 (1982). It is DSD's position that the Rock County Circuit Court's
 26 May 16, 2008, Order does not meet any of these standards and will be overturned
 27 by the Wisconsin Court of Appeals. Regardless of the outcome, for purposes of
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Hansen's petition, DSD's Petition for Leave to Appeal to the Wisconsin Court of Appeals under *Wis. Stat.* § 809.25 in Rock County Circuit Court Case No. 2007-CV-1120 filed in July 2007 qualifies as "on-going state proceedings." See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-611 (1975).

Finally, there is no question that Hansen could bring its petition to confirm the arbitration award in Wisconsin state court. The Wisconsin Arbitration Act provides for court confirmation of the arbitration award within one year after the award is made. *Wis. Stat.* § 788.09. That deadline can be adjusted pending judicial review of the award. *Wis. Stat.* § 788.09.

As federal courts in the Ninth Circuit "must abstain" from adjudicating a matter when the three *M&A Gabee* tests are met under *Younger* abstention, this Court may not consider Hansen's Petition.

B. The *Theis Research, Inc. v. Brown & Bain* decision does not apply nor does the arbitration award's "declaratory relief" satisfy the requirement for jurisdiction.

DSD has asked the Wisconsin courts to partially vacate the arbitration award because, in part, the JAMS Comprehensive Arbitration Rules & Procedures were not followed at the hearing as required by the parties' dealership agreement and DSD's rights under Wisconsin law were violated as a result. See *Hansen Petition* Exhibit 1, pp. 1-9 and Exhibit 1, page 18, Section 19. In *Theis*, the petitioner simultaneously filed both a motion to vacate a zero dollar arbitration award and a separate but, in the court's view, identical claim for \$200 million in damages in federal district court in California. *Theis Research, Inc. v. Brown & Bain*, 400 F.3d 659 (9th Cir. 2004). Rather than allow *Theis* to make an end run around its arbitration award by filing the same claims against the same party in federal district court after the arbitration, the court concluded that the amount in controversy in the

1 case filed in district court was the same as the amount at issue at arbitration;
2 therefore, Section 1332(a)'s requirements were met.

3 The *Theis* court relied, in large part, on the argument that other circuits look
4 to the underlying amount in controversy when the petitioner to federal court is
5 seeking to reopen the award. Although *Theis* did not caption its companion
6 lawsuit as a request to reopen the award, the court found that *Theis*'s lawsuit was
7 an attempt to reopen the award because *Theis*'s claims in the lawsuit were
8 substantially identical to those it arbitrated. See *Theis*, at 665 ("Although neither
9 *Theis* nor B&B asked the arbitration proceedings be reopened, *Theis* sought to
10 obtain by its district court complaint substantially what it had sought to obtain in
11 the arbitration.")

12 The *Theis* decision is not on point here. First, *Theis* was the petitioner at
13 federal district court and had the obligation to demonstrate the existence of federal
14 subject matter jurisdiction. *Fed.R.Civ.P. 8(a)(1)*. Hansen has that role here but has
15 failed to meet its Rule 8(a)(1) obligation.

16 Second, DSD has not filed a post-arbitration lawsuit to reopen its arbitration
17 claims. DSD's Wisconsin state claims have been on-going since July 2007.
18 Hansen has declared that it abandoned all of its claims against DSD at the
19 arbitration. The arbitrator agreed that the claims that were ultimately arbitrated
20 were only DSD's Wisconsin Fair Dealership Law claims and Hansen's defenses to
21 them. (See *Hansen Petition* Exhibit 1, Final Award, p. 157, l. 26-27.)

22 By Hansen's admission, then, the claims that were arbitrated were those first
23 filed by DSD under Wisconsin state law in Wisconsin state court in July 2007.
24 The action was stayed in state court at Hansen's request to permit arbitration of
25 DSD's Wisconsin Fair Dealership Law claims in California as provided by the
26 parties' dealership agreement. DSD is not the petitioner before this court. DSD
27 has returned to Wisconsin state court, as it is fully entitled to do under both that
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1 court's Order from July 31 Hearing and the Wisconsin Arbitration Act invoked by
2 Hansen last year, to request partial vacation of the award on the basis that the
3 arbitrator exceeded his authority at the hearing.

4 Hansen argues that the arbitrator declared that DSD could continue to
5 operate its Hansen dealership. Hansen attempts to bootstrap this claim into proof
6 of the requisite amount in controversy by calling it a declaratory judgment and
7 assigning to it an arbitrary value based on DSD's request for damages. The
8 arbitrator did not enjoin Hansen from terminating DSD's Hansen dealership.
9 Instead, he found that Hansen did not have "good cause" to terminate DSD's
10 Hansen dealership. Under Wisconsin law, Hansen can terminate DSD's dealership
11 without "good cause" if Hansen is willing to pay DSD for the loss of the business.
12 Of course, Hansen testified at the arbitration hearing that it has no plans to
13 terminate DSD's dealership. DSD's continued existence is thus not the "object of
14 the litigation" – as Hansen would have this Court believe – but rather is only a
15 collateral issue, which cannot satisfy the amount in controversy requirement. *See*
16 *e.g., New England Mortgage Sec. Co. v. Gay*, 145 U.S. 123, 130, 12 S.Ct. 815,
17 816, 36 L.Ed. 646 (1892) ("It is well settled in this court that, when our jurisdiction
18 depends upon the amount in controversy, it is determined by the amount involved
19 in the particular case, and not by any contingent loss either one of the parties may
20 sustain by the probative effect of the judgment."); *Rapoport v. Rapoport*, 416 F.2d
21 41, 43 (9th Cir.1969) ("It is well settled that the amount in controversy requirement
22 cannot be met by taking into account any collateral effect which may follow
23 adjudication."); *Quinault Tribe of Indians of Quinault Reservation in State of*
24 *Washington v. Gallagher*, 368 F.2d 648, 655 (9th Cir.1966) ("[J]urisdiction
25 depends upon the matter directly in dispute in the particular cause, and the court is
26 not permitted, for the purpose of determining its sum or value, to estimate its
27 collateral effect.").

1 **C. The law of the case is Wisconsin state law supplanting California**
 2 **state law.**

3 Controlling law in this matter is Wisconsin state law. In his decision on
 4 DSD's Choice of Law Motion, the arbitrator found:

5 **Hansen agrees** that the WFDL [Wisconsin Fair Dealership Law] and
 6 Wisconsin state law apply provided DSD proves it is a dealer as
 7 contemplated by that law. Provided DSD can demonstrate it is a
 8 dealer, **Hansen further agrees** Wisconsin law applies to the extent
 9 Wisconsin law conflicts with California law.

10 (*See Arbitrator's Decision on Choice of Law Motion, Hansen Petition* Exhibit 1, p.
 11 62) (emphasis added). DSD proved at the arbitration hearing that it is a "dealer"
 12 under the Wisconsin Fair Dealership Law and Hansen did not object to that finding
 13 after the interim award was issued. Therefore, Wisconsin law applies to this
 14 matter. Hansen's argument that, "California law (or federal law), **but not**
 15 **Wisconsin law**, controls enforcement of the Final Award" (emphasis in original) is
 16 utterly without merit.

17 Hansen also declares that, "No one could speak with more authority to refute
 18 [DSD's contentions that the matter involves Wisconsin public policy] than Judge
 19 Forbeck himself" (*Hansen Opposition*, page 8). Obviously, state appellate courts
 20 can speak with more authority than trial courts on matters of state public policy.
 21 DSD's petition for leave to appeal Judge Forbeck's decision is now before the
 22 Wisconsin Court of Appeals and will be considered in due course. If DSD is not
 23 successful, Hansen can file its petition for confirmation of the arbitration award in
 24 Wisconsin state court at that time.

25 **III. CONCLUSION**

26 As a court of specific jurisdiction, this Court should abstain from exercising
 27 jurisdiction over this matter under *M&A Gabee v. Community Redevelopment*
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1 *Agency of the City of Los Angeles*. Hansen consented to Wisconsin state law as the
2 choice of law at arbitration and failed to remove DSD's pending state court action
3 last year. This case meets all three of the *M&A Gabee* tests and, because it does,
4 abstention is required. Even if the Court were not required to abstain, the Court
5 does not have subject matter jurisdiction over Hansen's Petition because the
6 amount in controversy presented to this Court is zero. Hansen's Petition to
7 Confirm the Arbitration Award should be dismissed or stayed until state court
8 proceedings in Wisconsin have been completed. DSD asks this Court to dismiss or
9 stay Hansen's Petition to Confirm the Arbitration Award for the reasons described
10 herein.

11 Respectfully submitted,

12 Dated: June 2, 2008

13 FOLEY & LARDNER LLP
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